PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED April 30, 2007

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **MARK STEVEN WILLIAMS**, A Member of the State Bar.	**00-O-12707** **OPINION ON REVIEW**

In this original disciplinary proceeding, both parties have sought review of the hearing judge's decision finding respondent, Mark Steven Williams, culpable of three out of four counts of charged misconduct and a disciplinary recommendation that respondent be actually suspended from the practice of law for six months as part of a two-year stayed suspension.

The State Bar requests that we increase the recommended actual suspension to two years and until respondent demonstrates his rehabilitation pursuant to the Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii).[1] In addition, it contends that the hearing judge erroneously relieved respondent of culpability for count three (false advertising). Finally, the State Bar disputes the hearing judge's favorable finding of mitigation for respondent's mental health counseling, and asks us to order respondent to undergo mental health treatment as a condition of any probation imposed and to consider in aggravation respondent's delaying tactics as a failure to cooperate with State Bar proceedings. (Std. 1.2(b)(vi).)

Respondent seeks review of the hearing judge's application of collateral estoppel in this matter in order to find culpability for count one of the charged misconduct. Further, he asserts

[1]Unless otherwise noted, all further references to "standard" are to the Standards for Attorney Sanctions for Professional Misconduct.

that the hearing judge ignored evidence regarding respondent's ability to use the designation M.D. after his name even though he was not at the time licensed as a physician in California, and that the hearing judge improperly refused to admit essentially all of his evidence or to allow additional time to present witnesses due to a "pre determined agenda" on the part of the prosecutor and the court.[2]

Although we shall uphold the hearing judge's findings, for the reasons stated *post*, we shall recommend that respondent be required to participate in mental health treatment and that he be actually suspended from the practice of law for six months.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent was admitted to practice law on October 6, 1995, and has no prior record of discipline with the State Bar. He also obtained a Doctor of Medicine degree in 1979 from Yale University, and was first licensed to practice medicine in California on April 20, 1981. Respondent's medical license was revoked twice by the California Medical Board (Medical Board), first in 1989 and again in 1999. In 1989, based on impairment of respondent's ability to practice because of depression and bizarre behavior, respondent's medical license was revoked with the revocation stayed, and he was placed on five years' probation. On June 15, 1994, respondent's probation was completed.

Respondent's 1999 medical license revocation occurred, inter alia, as a result of several incidents where he made false and misleading statements and omissions on applications for hospital staff privileges. The Medical Board administrative law judge issued a decision to revoke respondent's medical license on May 18, 1999, which was adopted by the Medical Board on June 8, 1999. In connection with that hearing, respondent had received two continuances and sought a

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[2]Respondent has offered no evidence to support his allegations of bias. The burden of showing a claim of bias or prejudice rests on the complaining party. (*Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893.) Further, respondent asserts that the hearing judge made numerous errors of law based on this alleged bias. This allegation is without merit. Even if a judge were to have made numerous mistakes as to questions of law, that does not establish a ground for a charge of bias and prejudice. (*Ibid.*) In addition, where we have not addressed a specific assertion by respondent in this opinion, it is because we have concluded that the contention is meritless.

third, which was denied. On May 10, 1999, the day of his hearing, he failed to appear, claiming he had checked into a psychiatric hospital for treatment of depression. Absent any proof of this, the Medical Board hearing was held and a default judgment was issued.

Respondent filed a Petition for Writ of Mandate with the San Francisco Superior Court requesting its review of the revocation of his medical license. On November 4, 1999, the Superior Court denied the petition, rendering a judgment in favor of the Medical Board. Respondent did not subsequently appeal this order.

A. Factual Basis for the Charged Misconduct as an Attorney

Respondent applied for staff privileges at O'Connor Hospital (O'Connor) on November 3, 1994, and resubmitted the application on April 4, 1996. On April 14, 1997, O'Connor filed a Health Facility Reporting Form with the Medical Board, in which it stated that respondent's application was denied based on significant misstatements and omissions on the application form. Respondent had failed to disclose his prior discipline with the Medical Board, that he had been denied membership privileges at Roseville Hospital (Roseville) in 1989, and that his membership privileges had been revoked by American River Hospital (American River) in 1987. The Roseville application had been denied based on a concern regarding respondent's mental health, and the American River privileges were revoked in part due to a significant potential for patient harm including respondent's charged abandonment of a patient under a general anesthetic.

Respondent also stated on the 1994 application that he was on the provisional staff at Good Samaritan Hospital (Good Samaritan) in Santa Clara County from "1984 —? (never actually worked at Good Sam. (sic)." In the 1996 application, respondent added in his own handwriting that he had interim privileges at Good Samaritan, but did not change his original response. Respondent had only been given interim privileges at Good Samaritan for 90 days from March through May 1995, and Good Samaritan advised respondent as to the difference between interim and provisional privileges. Respondent also stated that he had been on the staff

at St. Mary's Hospital in San Francisco when he had not, falsely claimed that he was on "active" status at UCLA Hospital in Los Angeles, and falsely claimed that he had never been denied professional liability insurance.

On January 18, 1995, respondent submitted an application for staff privileges at El Camino Hospital (El Camino), which was denied. On October 21, 1996, El Camino filed a Health Facility Reporting Form with the Medical Board reporting the denial of respondent's application. The denial was based on respondent's false claim that he had never been denied membership at any hospital when, in fact, he had been denied privileges in 1989 at Roseville. Again, he falsely claimed that he had never been denied professional liability insurance.

In August 1993, respondent submitted an application under penalty of perjury to obtain a medical license in Oregon. His application was denied after a hearing on the matter by the Oregon Board of Medical Examiners on July 17, 1998, based on misstatements and fraudulent concealment of facts on the application. Respondent only provided the name of one mental health professional from whom he received treatment although he had seen several other mental health professionals. He also failed to disclose that American River had revoked his membership privileges in 1987, and concealed his denied application for staff membership at Marshall Hospital in Placerville. Respondent did not correct any of this information at the hearing regarding the Oregon application.

After the 1999 revocation of his medical license, respondent was employed by the law offices of Teal and Montgomery by at least 2001.[3] While employed with Teal and Montgomery, respondent evaluated legal cases that dealt with medical liability, conducted research, attended depositions, and gathered demonstrative evidence. He maintained an office with Teal and Montgomery and business cards using the M.D. designation after his name. His outgoing voicemail message identified himself as Dr. Williams. Respondent's employer placed three

[3]Respondent did not recall when he became employed at Teal and Montgomery. He stated that around August 2001 he was a consultant rather than a regular employee.

advertisements in the 2000, 2001, and 2002 Sonoma County Smart Yellow Pages, respectively,

featuring a photograph of a physician attending to a patient in a hospital room with the text "Contact an Attorney who is A Medical Doctor" and "Mark Williams M.D. Yale Medical, Stanford Law School, In Association, Law Offices of Teal and Montgomery."

Respondent did not disclose to his employer that his medical license had been revoked, and his employer only became aware of this fact when the Medical Board sent an investigator to the law firm to investigate the ads on August 1, 2001.[4] The investigator had been assigned in February 2001 to determine whether the use of the ads promoting the Teal law firm violated Business and Professions Code section 2054.[5] The investigator informed respondent that his use of the M.D. designation violated section 2054, and that if he stopped using M.D., she would close the investigation.[6]

In September 2001, the original investigator, accompanied by another investigator, visited the Teal law firm to see if respondent had complied with section 2054. The M.D. designation had been removed from the office window, but respondent's business cards bearing the M.D. designation were still available.[7] Based on the use of M.D. on respondent's business cards, the investigator concluded that respondent had failed to comply with section 2054 and referred the

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[4]Respondent's employer "assumed" that respondent was licensed and was "very, very disappointed" that respondent did not volunteer the information that his medical license had been revoked.

[5]References to "sections" are to the provisions of the Business and Professions Code, unless otherwise noted. Section 2054 prohibits any person from using the words "doctor" or "physician," the letters or prefix "Dr.," and the initials "M.D." without having a valid license to practice medicine.

[6]Respondent admitted to the investigator at this meeting that his employer was not aware his medical license had been revoked.

[7]Underneath his name, the business card said "Attorney at Law and Medical Doctor."

matter to the Sonoma County District Attorney on January 9, 2002.[8] In August 2002, the District Attorney charged respondent with three counts of violating section 2054. The case was dismissed after respondent completed the diversion program for misdemeanors.[9]

Respondent petitioned the Medical Board to reinstate his license while his criminal charges were pending in 2002. A hearing was held in January 2003, at which respondent did not `disclose the criminal action against him. On October 15, 2003, respondent's petition was denied for failure to show required rehabilitation.[10] Respondent never informed the State Bar that his medical license had been revoked. (See Bus. & Prof. Code, § 6068, subd. (o)(6).)[11]

B. State Bar Procedural History

The State Bar filed a Notice of Disciplinary Charges (NDC) against respondent on February 28, 2003. He was charged in count one with committing acts of moral turpitude, dishonesty, or corruption in violation of section 6106 for making false and misleading statements and omissions on his applications for hospital staff privileges and membership; in count two for

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[8]On January 31, 2002, the original investigator called respondent and learned that respondent's voice mail no longer identified him as "Dr. Williams."

[9]Respondent's testimony in the hearing department illustrates his continued insistence on the right to use the M.D. designation even though he is not a licensed physician. When asked if "[i]n fact, you continue to use the designation 'M.D.,'" he responded that "[m]y feeling is that, yes, I'm entitled to use the 'M.D.' designation. And I do not believe I ever committed a crime of any kind in that regard." In another response, he stated that "to this day I don't believe there's anything wrong with" using the M.D. designation on his business card. Also, when asked if he was currently holding himself out as a medical doctor, he responded: "I use the term "M.D."

[10]The prime reason cited by the administrative law judge for denying respondent's petition for reinstatement was his omission of key facts that he was the subject of the pending criminal charges.

[11]Section 6068, subdivision (o)(6) provides as relevant: "It is the duty of an attorney to do all of the following: [¶] . . . [¶] (o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following: [¶] . . .[¶] (6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere."

failing to report to the agency charged with attorney discipline, in writing, within 30 days of the time he had knowledge of any professional discipline from the Medical Board in violation of section 6068, subdivision (o)(6); in count three for violating the Rules of Professional Conduct, rule 1-400(D)(2)[12] by causing or permitting an advertisement that portrayed him as entitled to practice medicine when he did not posses a valid medical license; and in count four for failing to support the laws of this state in violation of section 6068, subdivision (a) by violating sections 2052[13] and 2054.

In March 2004, the matter was referred to the State Bar's Alternative Discipline Program (ADP), in which respondent declined to participate. In August 2004, the matter was referred back to the hearing department for trial. In May 2005, respondent requested admission to the ADP. This request was denied by the ADP judge. Respondent then sought interlocutory review of the ADP judge's decision, which we summarily denied on June 10, 2005.

On June 6, 2005, the State Bar filed a motion for collateral estoppel requesting that the adverse findings of the Medical Board proceeding which became effective on July 8, 1999, revoking respondent's medical license, and the judgment of the San Francisco Superior Court operate as collateral estoppel in this proceeding. On June 24, 2005, the hearing department granted the motion.[14]

The trial was originally set for June 29, 2005. Respondent did not appear. His wife

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[12]Unless otherwise noted, all further references to rule are to the California Rules of Professional Conduct.

[13]Section 2052 provides in pertinent part: "any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense . . . ."

[14]Prior to granting the motion, a settlement conference was held on June 13, 2005, in which the hearing judge indicated she was "leaning" toward not applying collateral estoppel. However, it was clear that her ruling was not made until June 24.

appeared and explained to the court that he had been admitted to Stanford Hospital the day before due to a panic attack and a "depressive bout." Respondent's wife asked for a continuance.

Over the objection of the State Bar, the court granted the continuance and set the trial for July 19, 2005. The trial lasted two days. Respondent and the original Medical Board investigator were the only witnesses. Respondent presented no witness to offer evidence in mitigation.

During the trial, respondent repeatedly requested that he be allowed to continue the hearing so that he might bring in witnesses who were not available to testify on either of the days set for trial. The hearing judge denied all such requests on the basis that respondent had had ample time to arrange to have witnesses available for the hearing.

The hearing judge found respondent culpable on count one by applying collateral estoppel and adopted the findings of the Medical Board's 1999 decision as upheld by the San Francisco Superior Court. Additionally, the hearing judge found culpability for counts two and four. The hearing judge declined to find culpability for count three, determining that the basis relied upon by the State Bar in charging a rule 1-400(D)(2) violation was not supported by the facts presented.

In mitigation, the hearing judge weighed respondent's participation in the State Bar Lawyers Assistance Program and his attendance at weekly group and individual therapy sessions to work on his mental health issues as "somewhat" mitigating. The hearing judge also considered respondent's testimony regarding volunteer work at Stanford University and other community service as mitigating evidence. In aggravation, the hearing judge found that respondent committed multiple acts of wrongdoing, including acts of moral turpitude, failing to notify the State Bar regarding the revocation of his medical license, and failing to support the laws of California. (Std. 1.2(b)(ii).) The judge also found that respondent committed other, uncharged, acts of misconduct surrounded by bad faith, dishonesty, concealment and overreaching by failing to disclose to the Medical Board that criminal charges were pending against him for violating section 2054 (std. 1.2(b)(iii)), and that respondent significantly harmed

the public and the administration of justice by his misrepresentations. (Std. 1.2(b)(iv).) The judge further determined that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct, stating that his "insistence that he has the right to use M.D. after his name is beyond truculence; it is a criminal act." (Std. 1.2(b)(v).) The hearing judge recommended that respondent be suspended from the practice of law for two years, stayed, and that he be actually suspended for six months. As noted *ante*, both sides requested our review.[15]

II. DISCUSSION

In every original disciplinary case, we have the duty to review the record independently. (*In re Morse* (1995) 11 Cal.4th 184, 207.) Upon doing so, we find that the hearing judge correctly applied the doctrine of collateral estoppel in this proceeding to find respondent culpable in count one.[16] In addition, we adopt all of the hearing judge's other culpability findings.[17] However, we amend the disciplinary recommendation for the reasons discussed *post*.

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[15]Two court days prior to oral argument before us, respondent moved for a continuance of the argument on the grounds that he was physically unable to prepare and appear as he was attending his elderly, ill parents and because he was advised by his doctor not to engage in stressful activity for thirty days. The next day, we denied this motion. On the day of argument, we received from respondent a two-page letter, dated two calendar days before our hearing and sent by facsimile without a copy sent to his opposing counsel. This letter stated that due to medical advice to avoid stressful situations, respondent will "refrain from (waive) engaging in oral argument." Respondent stated that his understanding was that neither side will be heard at argument and our decision will be based on the "paper submissions." Respondent proceeded in this letter to state a number of other objections to going forward.

Respondent's purported "waiver" of oral argument was ineffective as contrary to the rules. Rule 304 of the Rules of Procedure of the State Bar requires that a party may not waive argument less than five days before the scheduled date. Moreover, by using the phrase "The parties may waive oral argument . . .," this rule contemplates that to obviate a hearing, both parties must waive. On February 13, 2007, we heard briefly from the State Bar, which did not waive oral argument, posed questions to its counsel and submitted the matter for decision.

[16]Respondent's contention that the hearing judge had previously ruled not to apply collateral estoppel is not supported by the record.

[17]Respondent admits to culpability regarding count two, the failure to report the Medical Board's revocation of his medical license to the State Bar.

A. Collateral Estoppel

Respondent's main contention on review is that collateral estoppel should not have been applied in this matter because the Medical Board used "underhanded actions" that were unfair to him during the proceedings that led to the revocation of his license.[18] As respondent asserts that the Medical Board hearing was unfair, he argues that the State Bar Court hearing judge erroneously relied on those findings during the disciplinary hearing. As we will discuss, we find that the hearing judge properly applied the doctrine of collateral estoppel in finding respondent culpable in count one.

The doctrine of collateral estoppel "'precludes a party to an action from relitigating in a second proceeding matters that were litigated and determined in a prior proceeding. [Citations.]' [Citation.]" (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1193.) Collateral estoppel may be applied to State Bar Court proceedings in order to prevent an attorney from relitigating an issue resolved adversely to the attorney in a prior civil proceeding. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 205; *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr 138, 146.) Although the Medical Board proceeding is an administrative, not a civil, proceeding, a decision by an administrative agency may serve as a basis for collateral estoppel if it acts in a judicial capacity and resolves disputed issues of fact which the parties had an adequate opportunity to litigate. (See *Imen v. Glassford* (1988) 201 Cal.App.3d 898, 906-907 [real estate license revocation proceeding].)[19]

In order for collateral estoppel to apply in these proceedings, the issue that resulted in the civil or administrative court finding must be substantially identical to the issue in the State Bar Court, the finding must have been made under the same burden of proof applicable to the State Bar Court, the attorney must have been a party to the proceeding, a final judgment on the merits in the proceeding is required, and no unfairness in precluding relitigation of the issue is

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[18]Although respondent has alleged many improper actions committed by the Medical Board, there is no evidence of such impropriety contained in the record.

[19]It is clear from the record that the prior Medical Board hearing was conducted in accordance with these criteria.

demonstrated by the attorney. (*In the Matter of Kittrell, supra*, 4 Cal State Bar Ct. Rptr. at p. 205.)

As noted, the application of collateral estoppel in this proceeding only precludes an issue that was previously decided against a respondent under the clear and convincing standard of proof. (*In the Matter of Kittrell, supra.* 4 Cal. State Bar Ct. Rptr. at p. 205.) The burden of proof required in both a Medical Board hearing and a State Bar Court original disciplinary hearing is "clear and convincing" (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856), as both involve the suspension or revocation of a vested property right. (See *Gray v. Superior Court* (2005) 125 Cal.App.4th 629, 640 citing *Ettinger v. Board of Medical Quality Assurance, supra*, 135 Cal.App.3d 853; *In re Bar Association of San Francisco v. Sullivan* (1921) 185 Cal. 621, 623-624.)

Next, the basis for the charged misconduct in count one of the NDC was identical to the culpability findings of the Medical Board administrative law judge's decision (i.e., the omissions and misstatements on his applications for hospital privileges).

Respondent was a party to the Medical Board hearing and had the opportunity to participate in the prior proceeding, despite the eventual default judgment that was issued. The default judgment entered as a result of respondent's failure to appear at the Medical Board hearing does not preclude the use of collateral estoppel. (*Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1380, citing *English v. English* (1937) 9 Cal.2d 358, 363.) Respondent then unsuccessfully sought a writ of mandate of the Medical Board's adoption of the administrative law judge's decision from the San Francisco Superior Court without making any further appeal. Respondent had ample opportunity to participate in the Medical Board hearing and litigate the issues before the Board, and that Board's decision is now final.

Additionally, no unfairness to respondent resulted from the hearing judge's application of collateral estoppel. In fact, the hearing judge allowed respondent to explain the Medical Board

findings although she was under no obligation to do so. (See *In the Matter of Kittrell, supra,* 4 Cal. State Bar Ct. Rptr. at p. 206 [noting that a respondent must be given the opportunity to contradict, temper, or explain the evidence in a civil record when the State Bar chooses to rely upon the prior civil proceeding to prove an element of a disciplinary violation independent of the application of collateral estoppel].) Respondent failed to take advantage of the opportunity given him by not presenting any evidence other than his own testimony. Most of that was inadmissible as irrelevant or hearsay.

Respondent's arguments closely mirror those asserted in *In the Matter of Torres, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 146-147.) In *Torres,* the attorney disputed the application of collateral estoppel, contending that the civil trial judge was biased against him and there had been serious legal errors. He also asserted that he was suffering from an illness that rendered him unable to speak during the civil trial. In upholding the application of collateral estoppel, we stated that even if any of the above facts could have been established, that would not have conclusively determined that the application of collateral estoppel was unwarranted. (*Id*. at p. 147.) We also noted that the only evidence offered of such abuses was the attorney's own testimony, which was deemed not credible. Here, respondent has similarly presented no admissible evidence to demonstrate such injustices by the Medical Board. Without corroborating evidence, we decline to prohibit the application of collateral estoppel based solely on respondent's testimony.

Finally, the application of collateral estoppel is not barred even though some of the misconduct charged in the Medical Board and State Bar Court hearings occurred prior to respondent's admission to the Bar. Culpability based on respondent's pre-admission misconduct is not precluded in forming the basis for the charges relating to count one. In *Stratmore v. State Bar* (1975) 14 Cal.3d 887, 890, the Supreme Court clearly articulated that pre-admission misconduct may be considered in an attorney disciplinary hearing.

In *Stratmore v. State Bar, supra*, 14 Cal.3d 887, the attorney's pre-admission misconduct occurred close in time to his admission. In the present matter, respondent's misconduct occurred

as a continuing course running from pre- to post-admission, beginning close in time to his admission. As those same dates regarding respondent's misconduct were relied upon in both the Medical Board hearing and the State Bar Court hearing, the hearing judge was within her authority, pursuant to *Stratmore,* in finding culpability in count one. Even assuming, arguendo, that *Stratmore* is inapplicable in this matter, respondent would still be culpable for the misrepresentations he made on his re-application for privileges to O'Connor Hospital in 1996, along with his other post-admission misconduct.

Thus, respondent is culpable of committing acts of moral turpitude, dishonesty, or corruption in violation of section 6106 for making false and misleading statements and omissions on his applications for hospital staff privileges and membership, as charged in count one.

B. False or Misleading Advertising

The State Bar contests the hearing judge's finding that there was no clear and convincing evidence presented to show that respondent was responsible for the placement of the three yellow-page directory advertisements. We agree with the hearing judge. Rule 1-400(D)(2) is violated when a communication or solicitation contains false or deceptive matter, or matter that tends to confuse, deceive, or mislead the public. In our view, the record lacks clear and convincing evidence that respondent, as opposed to his employer, was responsible for the placement of the yellow-pages ads. The Medical Board did not deem respondent responsible for placing these ads, and we conclude that the hearing judge correctly dismissed this charge.

C. Section 6068, subdivision (a)

The hearing judge found by clear and convincing evidence that respondent violated section 6068, subdivision (a) because he continued to used the designation M.D. after his medical license had been revoked. We agree with this finding. The record amply evidences respondent's persistent use of the designation M.D., even after criminal charges were brought against him. Of great concern to us is respondent's continued assertion that he is legally entitled to use the designation M.D. even though he is not a licensed physician. As we discuss *post*, this constitutes a significant factor in aggravation.

III. DISCIPLINE

A. Aggravation and Mitigation

We agree with and adopt the hearing judge's findings in mitigation, and find no additional factors in mitigation.[20] We also adopt the hearing judge's findings in aggravation.[21] The State Bar has requested that we also find in aggravation that respondent has demonstrated a failure to cooperate with State Bar proceedings. (Std. 1.2(b)(vi).) We decline to do so. While respondent's repeated requests for continuances were persistent, and do demonstrate a pattern that began with his Medical Board hearing, we do not find clear and convincing evidence to "suggest a scheme to delay" the hearing. (Contrast *Weber v. State Bar* (1988) 47 Cal.3d 492 [aggravating factor found where respondent made repetitious requests for continuance that

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[20]Respondent testified regarding his participation in weekly therapy sessions and the Lawyer Assistance Program (LAP). The State Bar argued that the hearing judge erroneously found this as "somewhat" mitigating because the use of "somewhat" relieved respondent of his burden. While we decline to address the appropriateness of the use of the qualifier "somewhat," we independently find clear and convincing evidence of this mitigating factor.

[21]We also have found clear and convincing evidence to support the hearing judge's finding in aggravation regarding the uncharged conduct that respondent committed other acts of misconduct surrounded by bad faith, dishonesty, concealment and overreaching by failing to update the information on his petition and disclose to the Medical Board that criminal charges were pending against him for violating section 2054. (Std. 1.2(b)(iii).) (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) The documentary evidence of respondent's concealment from the Medical Board of the pendency of criminal charges against him is found in the decision of the Medical Board denying reinstatement. Although this document was not introduced in evidence and instead, was the subject of judicial notice, and although a court may not take judicial notice of hearsay statements contained in court records, we may take judicial notice of the truth of facts asserted in court orders, findings of fact and conclusions of law, and judgments. (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 255.) Here, the Medical Board's determination that respondent concealed pending criminal charges during the investigation of and conduct of the Medical Board reinstatement proceedings is the subject of several findings of fact and one legal conclusion of the Medical Board's administrative law judge. As such, sufficient evidence is before us to support this aggravating circumstance. Moreover, the record contains testimony from a Medical Board investigator that respondent failed to disclose the pending criminal charges during his reinstatement proceeding.

included threats to the court and filed a frivolous lawsuit against the State Bar, its officials, the hearing examiner and the referee, accusing them of conspiring to deny his civil and constitutional rights, as well as improper conduct].)

However, we place significant weight on the evidence demonstrating respondent's indifference toward rectification of or atonement for the consequences of his misconduct in adding M.D. after his name. (Std. 1.2(b)(v).) Respondent cites to no authority that supports his contention that he was entitled to do so. In fact, the issue regarding the use of the M.D. designation is well-settled in California. Contrary to the use of other earned degrees, such as J.D. or Ph.D., the legislature has chosen to restrict the use of M.D. to those who are currently licensed as physicians. (Bus. & Prof. Code, § 2054.) The California courts have affirmed this law as one that is designed to protect the public, and as such, is not an infringement on the person's rights. (See *Lawton v. Board of Medical Examiners* (1956) 143 Cal.App.2d 256, 260-261.)[22] While other jurisdictions may permit the use of M.D. without a medical license, California has prohibited the use of such terms and the statute is narrowly drawn so as not to offend any constitutional principles. (See *People v. Sapse* (1980) 104 Cal.App.3d Supp.1, 10-11.)

Respondent has not demonstrated any recognition that his argument is unavailing, and his repetitious claim causes us concern that he is ignoring well-settled law that proscribes such conduct. We agree with the hearing judge that respondent's insistence on his right to use the

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[22]As stated in part in *Lawton v. Board of Medical Examiners, supra,* 143 Cal.App.3d at p. 260: "The [medical] student and the public are entitled to know the qualifications of those who indirectly or directly affect the public welfare as does the medical profession. Neither graduation from a reputable institution nor otherwise sufficient education will excuse the necessity of being certified before a person may advertise his right to adorn his name with Dr. or M.D. Such letters are false insignia when a physician attempts to tell the world that he is licensed when in fact he is not. Whether or not they actually practice here is immaterial. The intent of the Legislature was to shield the public against those who for any reason have not been duly licensed. . . . The purpose of section 2142, *supra*, is to protect the public; it is not primarily concerned with what the doctor does with his time. There is no contention on the part of the state that Lawton was practicing medicine. His offense lay in holding himself out as a physician in this state although he does not possess a valid license to do so."

designation M.D. demonstrates an indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).)

B. Discipline

In every analysis, we must first consider the purpose of attorney discipline, which is the protection of the public, courts, and legal profession. (Std. 1.3; *In re Morse, supra,* 11 Cal.4th at p. 205.) Next, we look to the standards for guidance. (*In re Morse*, *supra*, 11 Cal.4th at p. 206.) The standards are afforded great weight in determining the appropriate level of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 92; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994) They are not mandatory provisions, "but they promote the consistent and uniform application of disciplinary measures." (*In re Morse*, *supra*, 11 Cal.4th at p. 206.) With the standards as guidelines, we next consider whether the discipline is consistent with prior decisions based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) We are then permitted to temper the law considering the peculiar circumstances surrounding the offense and offender. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222 [considering mitigating and aggravating factors].)

In the present matter, the applicable standards are standard 2.3 for respondent's culpability of section 6106 (committing an act of moral turpitude, fraud, or intentional dishonesty), and standard 2.6(a) for violating section 6068, subdivision (o)(6) (failing to report the revocation of his medical license to the state bar) and section 6068, subdivision (a) (violating his duties to uphold the laws of this state). When there are two or more acts of misconduct, the standard applied shall be the most severe. (Std. 1.6(a).) A violation of either standard 2.3 or 2.6(a) shall result in suspension or disbarment. Our review shows that cases involving simple deceit and improper "holding out" have ranged from reproval to suspension.

In recommending a six-month actual suspension, the hearing judge relied on *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, and *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, finding respondent's conduct most similar to *Wyrick* and

Chesnut.

In *In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. 332, an attorney misrepresented where he obtained his law degree on his résumé for a period of more than three years. He obtained a job interview from one of the firms that received his résumé, and did not correct or attempt to correct his misrepresentations during the interview. The hearing judge recommended an actual suspension of six months. In aggravation, Mitchell demonstrated a lack of candor by lying to the State Bar in interrogatories, and committed multiple acts of misconduct. In mitigation, the attorney testified that during the period of misconduct, his wife lost a child in the eighth month of pregnancy, which he attributed to worry about their finances, his wife became pregnant a second time, and he was concerned that his unemployment would lead to the loss of another child. On review, we attached significantly more weight to the attorney's mitigating evidence than the hearing judge did and reduced the actual suspension to sixty days.

In *In the Matter of Wyrick*, *supra*, 2 Cal. State Bar Ct. Rptr. 83, the attorney accepted employment as a judicial arbitrator, failing to disclose that he was at that time suspended from the practice of law. After his suspension was terminated, he failed to disclose his suspension when applying for several attorney positions. In aggravation, he had a prior record of discipline. He presented minimal evidence in mitigation. On review, we noted that respondent was grossly negligent in holding himself out as a licensed attorney applying for the arbitrator position. A six-month actual suspension was imposed.

In *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166, the attorney falsely represented to two judges that he had personally served an opposing party with a summons and complaint, violating sections 6068, subdivision (d) and 6106. He had a prior record of discipline, did not admit to any wrongdoing, and lacked candor. In mitigation, we gave credit to the attorney's good character and pro bono activities. Discipline of six months' actual suspension was imposed.

While calling for a two-year actual suspension, the State Bar seeks to distinguish the

foregoing cases and cites only *In re Morse, supra*, 11 Cal.4th 184, as support. We agree with the hearing judge's reliance on the above cases to aid her in determination of the appropriate amount of discipline, particularly when we consider respondent's continued refusal to accept settled law regarding the use of the M.D. designation. In this regard, we find respondent's attitude comparable to *In re Morse*, *supra*, 11 Cal.4th 184. However, we do not view *Morse* as calling for greater than a six-month actual suspension here.

In *In re Morse, supra*, 11 Cal.4th 184, discipline of three years' actual suspension was imposed upon an attorney who mailed approximately four million advertisements to the public, offering assistance in filing homestead declarations. The attorney violated a statute that governed homestead filing services, which included false advertising, but repeatedly asserted that the statute was unconstitutionally vague and violated his right to free speech. Despite an appellate court decision that his arguments were meritless, the attorney continued to raise the same arguments in his disciplinary hearing. We find the summarization by the Supreme Court as to Morse's conduct particularly on point in the current matter:

> "Of course, Morse, like any attorney accused of misconduct, had the right to defend himself vigorously. Morse's conduct, however, reflects a seeming unwillingness even to consider the appropriateness of his statutory interpretation or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, Morse went beyond tenacity to truculence." (*In re Morse*, *supra*, 11 Cal.4th at p. 209.)

In this regard, we find respondent's attitude similar, albeit less serious, than the attitude of concern in *In re Morse, supra,* 11 Cal.4th 184. Based on all of the circumstances, we recommend the six-month period of actual suspension as appropriate in order to adequately protect the public.

The State Bar also asks that we require respondent to undergo mental health treatment as a condition of any probationary period recommended. We agree with the State Bar's position. In our view, respondent has admitted in his reply brief before us that he has a history of "significant anxiety and depression," has difficulty dealing with situations such as the Medical Board and

State Bar proceedings, and absented himself for a time in both proceedings on account of his psychological distress, including declining to appear before us for oral argument. He also admitted that he continues to receive mental health treatment. Thus, our adding a condition of psychological or psychiatric treatment is not imposing a form of rehabilitation new to respondent. Although respondent claims his mental health has not caused harm to a client or patient, there is no doubt that respondent suffers from ongoing mental health issues warranting continued treatment. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 157-158; *In the Matter of Torres*, *supra,* 4 Cal. State Bar Ct. Rptr. at p. 154.)

IV. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent Mark S. Williams be suspended from the practice of law in the State of California for two years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of that suspension by stayed, and that respondent be placed on probation for said two year-period on the following conditions:

> 1. That respondent be actually suspended from the practice of law in the State of California during the first six months of the period of his probation.
>
> 2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of this probation.
>
> 3. Respondent must maintain, with the State Bar Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a)(1).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
>
> 4. Respondent must obtain psychiatric or psychological treatment from a duly-licensed psychiatrist, psychologist or clinical social worker, at his own expense, a minimum of twice per month and must furnish evidence of his compliance to the Office of Probation with each quarterly report. Treatment should commence immediately and, in any event, no later than 30 days after the effective date of the Supreme Court's final disciplinary order in this proceeding. Treatment must continue for the period of probation or until a motion to modify this condition is granted and that ruling becomes final. If the treating

psychiatrist, psychologist or clinical social worker determines that there has been a substantial change in respondent's condition, respondent or the State Bar may file a motion for modification of this condition with the State Bar Court Hearing Department pursuant to rule 550 of the Rules of Procedure of the State Bar. The motion must be supported by a written statement from the psychiatrist, psychologist or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification.

5. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the proper or good faith assertions of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation [and any probation monitor assigned under these conditions] which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

7. Within one year of the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and respondent shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

8. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for two years will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 9.20

It is further recommended that respondent be ordered to comply with rule 9.20, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty

(30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein.

Wilful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

VII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

STOVITZ, J.*

We concur:

WATAI, Acting P. J.

EPSTEIN, J.

[*]Hon. Ronald W. Stovitz, Retired Presiding Judge, sitting by designation of the Presiding Judge.